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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1138 OF 2004

in

SUIT NO. 709 OF 1994

1. Mrs Anjani Yeshwant Gokhale & ors .Plaintiffs

vs

1. Mrs Seemantini Shrikrishna Gokhale .Defendants & ors.

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Mr.Uday Warunjikar for Plaintiffs

Mr.S.M.Dange for Defendant no.1

Mr.R.M.Nakhwa for Defendant no.2

CORAM: A.S.AGUIAR, J

DATED: 22ND DECEMBER, 2004

P.C.

1. This Chamber Summons is taken out by the plaintiffs for permission to carry out amendment in

the plaint as per Schedule A annexed to the affidavit in support of the Chamber Summons. The amendment stated at Schedule A is for adding a prayer after prayer clause 18 (b) (i) for a decree of eviction as a consequential relief in favour of the plaintiffs and for eviction of defendant no.2 and for obtaining peaceful and vacant possession of the suit property.

2. The above suit was initially filed before the City Civil Court, Bombay but since it exceeded its pecuniary jurisdiction, the suit was withdrawn and thereafter filed before this court. The suit is for a declaration that the defendant no. 1 alone is not entitled to sell and dispose of the suit property which would be prejudicial to the right, title and interest of the plaintiffs as they are the co-owners of the suit property and a further declaration that the agreement dated 12th February, 1988 between the defendant nos. 1 and 2 is bad in law and not operative. The plaint was amended to incorporate the prayer in view of the execution of the sale deed dated 25th June, 1994 by the defendant no. 1 in favour of the defendant no.2.

Subsequent to the amendment, an additional written statement is filed by the defendant. Thereafter, on 7th July, 2004 this court was pleased to frame issues. One of the issues being Issue No. 11 which is based on para 20 of the written statement of defendant no.2 which reads as follows :

(i) Whether the suit is not maintainable as alleged in para 20 of the 2nd defendant's written statement

3. It is alleged that the defendant no. 1 had disposed of the suit flat in favour of the defendant no. 2 by sale deed dated 25th June, 1994 and that the defendant no. 2 is now in occupation of the flat. The submission of the defendant no. 2 in the said para is that since the suit is filed for a declaration as stated in paragraph nos. (a) and (b) and since there is no consequential (final relief) prayed for by the plaintiff and since the suit is for a declaration simplicitor, the same is required to be dismissed.

4. It is submitted by the learned counsel for the plaintiffs that at the time of the framing of

issues, no one was present on behalf of the plaintiffs as can be seen from the roznama dated 7th July, 2004 on which date the issues were settled and framed and therefore the plaintiff were not heard in the matter.

5. It is averred by the plaintiffs that thereafter he consulted his Advocate and took out the present Chamber Summons seeking an amendment in prayer clause and for consequential and final reliefs. It is further submitted that since the plaintiff has filed the present Chamber Summons immediately after framing of the issues, there is no delay in filing the present Chamber Summons.

6. The defendant no. 2 has filed his affidavit in reply dated 10th September, 2004 opposing the Chamber Summons on the ground that in the original written statement as well as in the additional written statement, it has been the stand of all the defendants that the suit is not maintainable in the present form. It is pointed out that the plaintiff was fully aware that upon entering into an agreement with the defendant no.1 the defendant

no.2 had entered into possession of the suit flat which was agreed to be sold to him and that he is now in peaceful occupation of the said flat to the knowledge of the plaintiff as most of the plaintiff are resident in the same building. It is pointed out that despite this, the plaintiffs have till date never prayed for possession of the suit flat from the defendant no.2. It is further pointed out that it was specifically contended in the written statement that the suit simplicitor for declaration is not maintainable in law and therefore requires to be dismissed. It is further pointed out that when the suitwas filed in 1988, the defendant was already in possession of the suit flat which was to the knowledge of the plaintiff. Even the summons was served upon the defendant no.2 at the suit flat. All this indicates that the plaintiff had knowledge about the defendants being in possession of the suit flat. But despite this the plaintiff has not prayed for the relief of possession as against the defendant no.2.

7. It is contended by the learned Advocate for the defendant no. 2 that the plaintiff ought to have

prayed for possession way back in the year 1988 itself and therefore the present amendment which is sought after 16 years from the date of accrual of the cause of action is hopelessly barred by limitation. A final contention of the learned counsel for the defendant no. 2 is that the proposed amendment will change the nature of the suit and hence prejudice would be caused to the defendant no.2 in allowing the amendment since the right which has already accrued to him on account of lapse of time and latches on the part of the plaintiff, would be taken from the defendant no.2.

8. Learned counsel for the defendant no.2 has submitted that in view of the serious prejudice that would be caused to him, the court should not allow the amendment. In support of his contention, learned counsel has relied upon a judgment of T.N.Alloy Foundry Co.Ltd vs T.N.Electricity Board and others reported in 2004 (3) SCCs 392. Also reliance is placed on the judgment in the case of L.J.Leich and Co. Ltd and anr vs. Messrs Jairdine Skinner and Co. reported in AIR 1957 Supreme Court 357 = 1957 SLR 438 wherein the Supreme Court held

that the court as a rule decline to allow the amendments, if fresh suit on the amended claim would be barred by limitation on the date of the application. However, the courts have also observed that this is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the court to order it, if that is required in the interests of justice. Learned Advocate for the applicant has also placed reliance on the said decision. The said decision clearly recognises the discretion of the court to allow or not to allow the amendment and this discretion would be exercised judicially by the courts by taking into consideration the relevant factors as to whether there has been any gross delay on the part of the plaintiff in applying for amendment. The Supreme Court in the case of Mrs Rukmabai vs Lala Laxminarayan & ors reported in AIR 1960 Supreme Court 335 has held that the plea that the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of section 42 and hence thesuit should have been dismissed in limine should beraised at the

earliest point of time in which event the well settled rule of practice not to dismiss suits automatically but toallow the plaintiff to make necessary amendmentif he seeks to do so.

9. From the first written statement dated 18th February, 2002 it is seen that the plaintiffs has taken up the plea in para 20 of the said affidavit and it was pursuant to this plea in para 20 that the court by its order dated 7th July, 2004 was pleased to raise issue no. 11 as to whether the suit is not maintainable in view of the averments in para 20 of the defendant's written statement. Thereafter, it appears that the plaintiffs have taken out the Chamber Summons on 3rd August, 2004. It may be noted that the written statement is dated ...February, 2002 but no steps were taken despite the averments of the defendant no.2 that the suit was not maintainable. It was only after the framing of issues on 7th July, 2004 that the plaintiffs have taken out the present chamber summons.

10. It may be noted that even on the date of

framing of the issues neither the plaintiff nor his advocate were present. But, subsequently the plaintiff learnt on obtaining a copy of the issues that Issue no. 11 which was based on averments made in para 20 of the defendant no.2's written statement and it was thereafter that the plaintiffs have taken steps to take out the chamber summons.

11. It may be noted that at the time when the original written statement was filed by the defendants, the plaintiff was being represented through another advocate one Mr. Nitin Gangal. It appears that the said suit came to be dismissed for default sometime in 1997 and nothing happened in the matter till steps were taken by the present advocate for restoration of the suit and suit came to be restored on 12th October, 2000. The written statenment as pointed out earlier was filed on 18th February, 2002 and issues were framed on 7th July, 2004. It appears that there was no application of mind at that time to the matter. It appears that the learned advocate for the plaintiff at the stage of applying for restoration of the suit which was dismissed was more concerned with getting the suit

restored rather than ascertaining that the plaint which was drafted by the previous advocate was in order. After the present advocate came on record, he took steps to get the suit restored and the suit was restored on 12th October, 2000. Thereafter, nothing happened in the matter till the defendant no.2 filed his written statement on 18th February, 2002. It appears that there was no occasion for the learned advocate for the plaintiffs to consider the written statement at that stage. It was only after issues were framed on 7th July, 2004 that it was realised that the suit required to be amended and accordingly the plaintiffs had moved for amendment.

12. It is trite that the plaintiff cannot be made to suffer on account of any omission or negligence on the part of his advocate. The court must consider doing justice in the matter and not allow the plaintiffs to suffer by his suit being dismissed on account of any technicality. In support thereof, advocate for the plaintiff has relied upon the observations of the Supreme Court in the said case of Rukminibai vs Lala Laxminarayan

supra wherein the court has observed that it is a well settled rule of practice not to dismiss the suit but to allow the plaintiff to make neccesary amendment if any. The court in its discretion after taking into consideration various aspects of the matter, ought to grant the reliefs.

13. In the present case, it is seen that the plea raised is a technical one. The plaintiffs cannot be expected on their own to have instructed their advocate to take the required steps to amend the plaint.

14. It appears to me that the plaintiff have acted without unnecessary delay in taking out the present motion. In the circumstances, I am inclined to grant relief.

15. Accordingly, Chamber Summons is made absolute in terms of prayer clause (a). No order as to costs. Amendment to be carried out within a period of two weeks. The amended copy to be served within one week thereafter. Defendants to file their additional written statement, if any, within a

period of three weeks after receipt of the amended copy. Matter to appear on board for directions on 16th February, 2005. All further issues if any are kept open.

A.S.AGUIAR, J